JAMES FOSTER AND PLEASANTS ELAM, PLAINTIFFS IN ERROR *vs.* DAVID NEILSON, DEFENDANT IN ERROR.

By the treaty of St Ildefonso, made on the 1st of October 1800, Spain ceded Louisiana to France; and France, by the treaty of Paris, signed the 30th of April 1803, ceded it to the United States. Under this treaty the United States claimed the country between the Iberville and the Perdido. Spain contended that her cession to France comprehended only that territory which at the time of the cession was denominated Louisiana, consisting of the island of New Orleans, and the country which had been originally ceded to her by France, west of the Mississippi

The land claimed by the plaintiffs in error, under a grant from the crown of Spain, made after the treaty of St Ildefonso, lies within the disputed territory; and this case presents the question, to whom did the country between the Iberville and Perdido belong after the treaty of St Ildefonso?

Had France and Spain agreed upon the boundaries of the retroceded territory, before Louisiana was acquired by the United States; that agreement would undoubtedly have ascertained its limits. But the declarations of France, made after parting with the province, cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government, in a matter vitally interesting to itself. [306]

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights; and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. [307]

However individual judges might construe the treaty of St Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed. [307]

After the acts of sovereign power over the territory in dispute, which have been exercised by the legislature and government of the United States, asserting the American construction of the treaty by which the government claims it; to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted; it is not in its own courts that this construction is to be denied. [309]

If a Spanish grantee had obtained possession of the land in dispute so as to be the defendant, would a court of the United States maintain his title under a Spa-

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nish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St Ildefonso was right, and the American construction wrong? Such a decision would subvert those principles which govern the relations between the legislature and judicial departments, and mark the limits of each, [309]

The sound construction of the 8th article of the treaty between the United States and Spain, of 22d February 1829, will not enable the Court to apply its provisions to the case of the plaintiff. [314]

The article does not declare that all the grants made by his catholic majesty before the 24th of January 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and it would have repealed those acts of congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject. [314]

A treaty is in its nature a contract between two nations, not a legislative act. If does not generally effect of itself the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. [314]

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court. [314]

IN error to the district court of the eastern district of Louisiana.

The plaintiffs in error filed their petition in the district court setting forth, that on the 2d of January 1804, Jayme Joydra purchased of the Spanish government for a valuable consideration, and was put in possession of a certain tract or parcel of land, situated in the district of Feliciana, thirty miles to the east of the Mississippi, within the province of West Florida, containing forty thousand arpents, having the marks and boundaries as laid down in the original plat of survey annexed to the deed of sale, made by Juan Ventura Morales then intendent of the Spanish government, dated January 2d, 1804, which sale was duly confirmed by the

king of Spain, by his resolves dated May 29, 1804, and February 20th, 1805.

May 17, 1805, Jayme Joydra sold and conveyed six thousand arpents, part of the said forty thousand, to one Joseph Maria de la Barba; and upon the same day, Joseph Maria de la Barba sold and conveyed three thousand arpents, parcel of the six thousand so purchased on the same day of Jayme Joydra, to one Francoise Poinet, for the consideration of $750. These three thousand arpents; situated in the district of Feliciana, about thirty miles east of the Mississippi; bounded on the north by the line of demarcation between the United States and the Spanish territory; on the west by lands of Manuel de Lanzos; on the east by the lands of the said Jayme Joydra; and on the south by the lands of the said Joseph Maria de la Barba.

In June 1811, Francoise Poinet, by her attorney, Louis Leonard Poinet, sold to the petitioners the said three thousand arpents, for the sum of $3200.

The petition then avers, that the three thousand arpents of lands justly and legally belong to them; and that nevertheless, David Neilson the defendant, a resident of the parish of east Feliciana in the state of Louisiana, had taken possession of the same, and refuses to deliver the same up.

On the 23d of March 1826, the defendant in the district court filed exceptions to the petition; and the questions before this Court arose out of the third exception, which was as follows:

That the petition does not show any right in the petitioners to the land demanded, which they aver lies in a district formerly called Feliciana, in the province of West Florida; and they claim under a grant made at New Orleans on the 2d of January 1804, and regularly confirmed by the Spanish government: whereas, as defendant pleads, all that section of territory called Feliciana was, long before the alleged date of said grant, ceded by Spain to France, and by France to the United States; and the officer making said grant had not then and there any right so to do, and the said grant is wholly null and void.

The judgment of the district court is founded on this ex-

ception; and decides that the grant under which the plaintiffs claim, was made by persons having no authority, at the time of the grant, to grant lands within the territory within which the lands are situated; and dismisses the petition.

On behalf of the petitioners, the plaintiffs below, it was contended:

1. That Spain possessed full right and title, at the period of the date of the grant under which they claim, to grant the lands in question.

2. That the title of the petitioners is guarantied and confirmed by the treaty between the United States and Spain of February 22d, 1819.

The case was argued by Mr Coxe and Mr Webster for the plaintiffs in error; and by Mr Jones for the defendant.

Mr Coxe, for plaintiffs in error.

This is a petitory action, in the nature of an ejectment, brought by the plaintiffs in error, to recover a tract of land in the parish of east Feliciana in the state of Louisiana. The territory within which this property lies, may be designated in general terms as included between the Mississippi and Iberville to the west, the Perdido to the east, and south of the thirty-first degree of north latitude.

No objection has been interposed to the regularity, in point of form, of the original grant under which plaintiffs claimed title, or of the mesne conveyances from the original grantee to them. No title has been exhibited by the defendant; but having acquired the possession, he has rested his defence on the single ground of denying the validity of the grant, which lies at the foundation of the plaintiffs' title; and this objection is confined to the single point, that the authority of the Spanish government, from which that grant emanated, had terminated within the district of country, the boundaries of which have been indicated, anterior to the date of the grant.

The grant bears date in the years 1804 and 1805, and it is contended that, by the treaty of St Ildefonso between Spain and France in the year 1800, and the treaty between

France and the United States, of April 30, 1803, the territory in question became vested in the United States as a component part of Louisiana.

Whether such be the true interpretation and effect of these treaties, is the first question presented for consideration. It is a question which has for years been diplomatically discussed between the governments of Spain and the United States; and now comes before this Court to be finally settled judicially.

Much of the history of the early settlements of the territory in question, and the grounds upon which the claims of England, France and Spain rested, were presented and discussed in the cases of Henderson *vs.* Poindexter, 12 *Wheat.* 530, and Harcourt's lessee *vs.* Gaillard.

It may however be proper to remind the Court, that in point of fact, it appears that the earliest actual settlement made by the French in this district, was made under D'Iberville, at Dauphin island in the year 1699; and that at that period, and for some years previous, the English had formed settlements between the Mobile and the Mississippi, 4 *N. Am. Rev.* 76, *N.S.* Anderson's History of Commerce, Vol. III. 195, fixes it at 1698. On the 30th of June 1677, Charles II. made his second grant to the earl of Clarendon and others, which included this territory. 1 *L. U. S.* 465. *Land Laws*, 81.

The grant from Louis XIV. to Crouzat, bears date September 14th, 1712, thirty-five years subsequent to the English patent; and it sets forth that the original possession was taken of the territory in 1683, which is six years subsequent to the English grant. It may be remarked, however, that the possession to which allusion is made, was nothing more than a transient and rapid passage down the Mississippi, and vague as it was, in point of fact did not extend beyond the banks of the river.

This grant to Crouzat seems to have been generally considered as comprehending this debatable ground, but apparently without much reason. It distinctly limits the eastern extent by the lands of the English Carolina: and not only the grant of the Carolina, but the actual settlements under it

extended much to the westward of the line to which France subsequently claimed to extend the eastern boundary of Louisiana.

The irreconcileable claims of England and France, in reference to the extent of their American possessions, gave rise to many and bloody controversies; and particularly to the war of 1756. Numerous discussions took place between the two crowns upon this subject, which it will be unnecessary to examine earlier than the war which terminated in their adjustment and settlement. In the negotiations which preceded the treaty of 1763, which are stated in 3 *Jenkinson*, 1174, it seems that France preferred her claim as far as the Perdido; and the answer of the British government to this claim will be found in its reply to the French ultimatum, September 1st, 1762, sec. 2. 3 *Jenkinson*, 148. It was deemed utterly inadmissible, because it would comprise extensive countries and numerous nations of Indians, who have always been reputed to be under the protection of the king.

This Court, in Johnson *vs.* M'Intosh, 8 *Wheat.* 581, has remarked, in reference to the controversies between France and Spain in relation to this same district of country, that "the contests between the cabinets of Versailles and Madrid respecting the territory on the northern coast of the gulf of Mexico were fierce and bloody, and continued until the establishment of a Bourbon on the throne of Spain, produced such amicable dispositions in the two crowns as to suspend or terminate them." And after giving a summary of those which occurred between France and England, it is observed that "these conflicting claims produced a long and bloody war, which terminated by the conquest of the whole country east of the Mississippi."

Pending that war, in which Spain had been induced to take part with France, the celebrated treaty was concluded between these two powers, which is entitled to notice in the present investigation. It was styled "Pacto de Familia," or, "Parte de Famille;" and is usually known in England and the United States, under the appellation of the "Family

Compact." It was signed *August* 15, 1761; ratified by France *August* 21, 1761; and by Spain, *August* 25, 1761(*a*).

The 4th article embraces the great object of the treaty, "qui attaque une couronne, attaque l'autre;" and the 18th, carrying it out into detail, provides that, "en conformité de ce principe et de l'engagement contracté en consequence, leur majestés tres chretienne et catholique, sont convenues que lorsqu'ils s'agira de terminer par la paix la guerre qu'ils auront soutenue en commun, elles compenseront les avantages que l'une des deux puissances pourroit avoir eus, avec les pertes que l'autre auroit pu faire; de manière que sur les conditions de la paix, ainsi que sur les operations de la guerre; les deux monarchies de France et de l'Espagne, dans toute l'étendue de leur domination, seront regardés et agiront si elles ne formoient qu'une seule et même puissance." This provision is necessary, to enable us to comprehend with precision, the motives which induced, and the construction which is to be given to subsequent acts.

The preliminary articles of the treaty of peace, between Great Britain, France, and Spain, were signed November 3d, 1762. On the same day, another treaty was executed between France and Spain, originating in, and designed to fulfil the stipulations of the 18th article of the family compact. Roch, in his Traités de Paix(*b*), furnishes the following statement of it. "La Nouvelle Orleans, *avec la Louisiane, située à l'ouest du fleuve Mississippi*, fut cedée aux Espagnols, par une convention secretê entre les deux cours de Versailles et de Madrid, signée le 3 de Novembre 1762, et qui n'a jamais eté imprimée. Cette cession avoit pour motif de dedommager l'Espagne de la Floridé, qu'elle abandonnoit à l'Angleterre par la traité des preliminaires de Paris, signée le même jour. Les habitans Francois de la Louisiane n'eurent connoissance de cette cession que le 21 Avril 1764. Ils addresserent à le sujet à la cour de France les plus vives reclamations, qui n'empecherent pas les Es-

(*a*) 1 *Coleccion de Tratados*, 115. *Marten's Recueil des Traités*, Tom. I. p 1. 3 *Jenk.* 70.

(*b*) Tom. III: p. 109.

pagnols de prendre possession de cette colonie le 18 Aout 1769."

This cession then grew out of the provisions of the preliminary treaty of the same date, and was designed to compensate Spain for the loss of Florida. It must be construed subordinately to that general treaty, and cannot modify or control its provisions.

Keeping these considerations in view, we may proceed to examine the preliminary treaties of the same date, which were finally consummated by the definitive treaty of February 10, 1763(*a*). The first fourteen articles relate to France and Great Britain: the six succeeding to Great Britain, her ally Portugal, and Spain. The 6th article establishes the boundaries between the English and French possessions, in the neighbourhood of the Mississippi, and so far as is material to this case, in the following words: "The confines between the dominions of Great Britain and Spain, on the continent of North America, shall be irrevocably fixed by a line drawn along the middle of the river Mississippi, to its source, as far as the river Iberville; and from thence, by a line drawn along the middle of this river, and of the lakes Maurepas and Pontchartrain to the sea; and to this purpose the most christian king cedes in full right, and guaranties to his Britannic majesty the river and port of Mobile, and every thing which he possesses on the left side of the river Mississippi; except the town of New Orleans, and the island on which it is situated, which shall remain to France." By the 19th article, "his catholic majesty cedes and guaranties, in full right, to his Britannic majesty, all that Spain possesses on the east or the south east of the river Mississippi."

A reasonable interpretation of these two treaties seems to conclude this question. Each party had been, nearly from the commencement of the century, claiming an almost interminable extent of territory; their claims were bringing them into constant collision with each other; these collisions had engendered the war which was about to be terminated. The parties had agreed, that their relative rights should be defini-

(*a*) *Colleccion de Tratados*, 145. 2 *Marten*, 17. 3 *Jenkins*, 166.

tively and irrevocably adjusted, and natural boundaries were agreed upon, which it was supposed would preclude all future difficulty. England had been triumphant in the conflict; she had attained the objects for which she had commenced and had continued hostilities. During the negotiations for peace, she had avowed her determination. 3 *Jenkins*, 117. "The limits of Canada with regard to Louisiana shall be clearly and firmly established, as well as those of Louisiana and Virginia; in such manner, that after the conclusion of peace there may be no more difficulties between the two nations with respect to the construction of the limits with regard to Louisiana, whether with respect to Canada or the other possessions of England." In accomplishing this design, France relinquished the pretensions upon which she had before insisted to extend the limits of Louisiana to the eastward of the Mississippi; England yielded her empty and valueless claim, to carry the bounds of her Atlantic colonies to the Pacific; and to close all ground for future controversy, Spain ceded her possessions; and Great Britain became the unquestioned proprietor of all the territory lying to the eastward of the line designated in the 6th article.

France then, in ceding Louisiana to Spain, ceded a country, which, with the exception of the island of Orleans, lay exclusively to the westward of the Mississippi; she cedes it as Louisiana, and it is accepted as such. Both of these powers were estopped by these solemn acts from contending that Louisiana embraced the territory now the subject of consideration.

This treaty has received the consideration of this Court in Harcourt *vs.* Gaillard, 12 *Wheaton*, 524, where it was observed, "the country of Florida, south of the 29th degree, was a conquest by Great Britain; and north of the 29th degree, and *up the Mississippi* was held as a part of her own territory, concerning which her treaties with France and Spain only *established a disputed boundary*."

After England had thus acquired the title to Florida, and had adjusted by solemn compact the disputes as to boundary, she immediately erected these acquisitions into two governments, and designated them by the names of East

and West Florida; the boundaries of which are indicated in the proclamation of the British king in 1763. From that period until after the United States acquired Louisiana, this question was considered as at rest. The territory to the eastward of the Mississippi and the Iberville, the lakes Maurepas and Pontchartrain, were uniformly recognised as East and West Florida; that to the westward of the same line as Louisiana

During the peace which preceded our revolutionary war, no question, or ground for question, existed. About the year 1781, Spain acquired by conquest possession of West Florida, which she retained under that name, not as part of Louisiana which then belonged to her, but as a territory which she had acquired by conquest from England the lawful proprietor, known only by the appellation of West Florida.

This possession thus acquired, was thus continued, *jure belli*, until the termination of the war. By the 3d article of the preliminary treaty of peace, it was stipulated that his Britannic majesty should cede East Florida, and his Catholic majesty should retain West Florida. So also by the 5th article of the definite treaty of September 3d, 1783, his Britannic majesty cedes, in absolute property, to his Catholic majesty, as well East as West Florida, guarantying them. No boundaries are mentioned. The Floridas, known as such by both parties to the compact, are ceded by words of express grant. It is not an adjustment of disputed boundaries, but a cession of an absolute and perfect right.

The treaty of 1763, then, which this Court has considered as merely fixing a disputed boundary, still continued in force. The war had not affected this portion of its stipulations. "Where treaties contemplate a permanent arrangement of territorial and other national rights, it would be against every principle of just interpretation, to hold them extinguished by the event of war." Society, &c. *vs.* New Haven, 8 *Wheaton*, 494.

We may now briefly review some of the leading acts of all the powers concerned in the treaties of 1763 and 1783; to show that, uniformly and without exception, such has been their understanding of these compacts.

1. France considered the cession made by her to Spain as comprehending the entire province of Louisiana. The first public intimation of that cession is contained in the letter of the French king to Monsieur L'Abbadie(*a*), dated April 21st, 1764. It commences with these words: "Monsieur L'Abbadie;—By a special act done at Fontainebleau, November 3d, 1762, of my own will and mere motion, having ceded to my very dear and best beloved cousin the king of Spain and to his successors in full property, purely and simply, and without any exceptions, *the whole country known by the name of Louisiana*, together with New Orleans and the island on which the said city is situated; and by another act done at the Escurial, November 13th in the same year, his catholic majesty having accepted the cession of the said country of Louisiana, and the city and island of New Orleans, &c." This contemporaneous exposition of both parties to the treaty, before any other interests or rights had intervened, is entitled to grave consideration.

2. So in regard to Spain. She had previously, as had England, endeavoured to confine French Louisiana to the western shore of the river; she had accepted a cession of that territory as comprehending "the whole of Louisiana," and from that period to the present has always so esteemed it. After she obtained possession of her newly acquired territory, she continued to hold it under the same name by the same limits. When by the treaty of 1783, she acquired the Floridas from England; it was under a new and distinct title, wholly independent of that by which she held Louisiana. The treaty designates it as East and West Florida. In all the subsequent controversies between Spain and the United States the same names are preserved. To many purposes it was a distinct government from that of Louisiana, though both belonged to the same monarch: it was sometimes a dependency upon Cuba(*b*); and when annexed, as it appears occasionally to have been, to the government

(*a*) 1 *Laws of United States*, 442.
(*b*) *Land Laws*, 46.

of Louisiana, the executive magistrate was styled the governor of Louisiana and of West Florida.

In the treaty of October 27, 1795, between Spain and the United States, the same distinction is recognised and retained. The 2d article thus declares: "the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, &c." Art. 4th, "It is likewise agreed that the western boundary of the United States, which separates them from the *Spanish colony of Louisiana*, is in the middle of the channel or bed of the river Mississippi, from the northern boundary of the said states to the thirty first degree of latitude north of the equator." The 5th article is to the same purport.

Subsequently to the transfer of Louisiana to the United States, Spain has uniformly asserted the same principles; and has protested, in the most decided terms, against the pretensions of the American government, to extend their purchase to the Perdido. Governor Folch's letter to governor Claiborne, dated Pensacola, May 1, 1804, assumes the ground which has been uniformly maintained throughout the diplomatic discussions of this question.

3. It is scarcely necessary to recapitulate the various acts of Great Britain, by which she manifested and maintained her right to restrict the limits of Louisiana to the western shore of the Mississippi. Long before the treaty of 1763, this had been a fruitful source of discord between herself and France. The war of 1756 had grown out of the attempt by the latter to extend her two colonies of Canada and Louisiana(*a*). The grounds assumed by her in her subsequent negotiations, and the manner in which she succeeded in establishing them, have been already considered.

4. In this controversy, conducted in an American tribunal, it may well be deemed important to ascertain the views which have been taken and acted upon by our own government: and the result of this inquiry will show, that the

(*a*) 1 *Marsh. Wash.* 372. 383.

United States have been as distinct as any nation, in asserting the principles for which the plaintiffs in error contend.

As early as the year 1779 the importance of this question was perceived. In the instructions then framed for Mr Jay, to conduct the negotiations with Spain which were entrusted to his charge, there is a distinct recognition of the Floridas, and an implied one of their extending to the Mississippi(*a*). In the following year congress prepared a statement of the claim of the United States to the western country as far as the river Mississippi(*b*), in which the subject is discussed, and the points now insisted upon strongly urged. The minister was instructed "to insist upon the navigation of the Mississippi for the citizens of the United States, in common with the subjects of his catholic majesty, as also on a free port or ports below the northern limit of West Florida." Reference is made to the treaty of 1763, as having fixed the river Mississippi as the boundary between the United States and the Spanish settlements; and it is strongly urged, that the United States are entitled to the benefit of the cession made by Spain to Great Britain. In 1791, the secretary of state made a report on the subjects of controversy between the two governments, in the course of which these matters are again considered and pressed(*c*). "Our right to navigate the Mississippi, from its source to where our southern boundary strikes it, is not questioned. It is from that point downwards only, that the exclusive navigation is claimed by Spain; that is to say, where she holds the country on both sides, to wit, Louisiana on the west, and Florida on the east." Again, "Florida was ceded by Spain, (by the treaty of 1763,) and its extent westwardly was fixed to the lakes Pontchartrain and Maurepas and the river Mississippi." "We had a common right of navigation in the part of the river between Florida, the island of Orleans, and the western bank." "If we appeal to the law of nature and nations, as expressed by writers on the subject, it is agreed by them, that were the river, where it

(*a*) 2 *Pitk. Hist.* 511. (*b*) 2 *Pitk. Hist.* 512.
(*c*) 1 *Diplom. of the United States*, 236.

passes between Florida and Louisiana the exclusive right of Spain," &c.

Reference has been already made to the provisions of the treaty of 1795, as conclusive upon both governments; and it may be added, that in the negotiations which preceded that treaty, as well as in the measures of both nations in carrying its stipulations into execution, by running the line agreed upon, West Florida, as belonging to Spain, is uniformly considered as extending to the Mississippi, and Louisiana as confined to the western side of the line designated in the treaty of 1763.

It thus appears, that from the earliest periods of colonial history, Great Britain and Spain had insisted that Louisiana did not extend eastwardly beyond the Mississippi; that France finally yielded her pretensions by the treaty of 1763; and that from that period this question had been considered as settled and at rest, not only by all the parties to that compact, but especially by the United States.

The next important document to be examined is the treaty of St Ildefonso, of October 1st, 1800, between Spain and France. One article of this treaty alone has been communicated to the public, and that will be found recited in the treaty between France and the United States, of April 30th, 1803(*a*), the first article of which is in these words, "whereas by the article the third of the treaty concluded at St Ildefonso the 9th Vindemiare, an. 9, (1st October 1800,) &c. it was agreed as follows: 'his catholic majesty promises and engages on his part to retrocede to the French Republic, &c. &c. the colony or province of Louisiana, with the same extent it now has in the hands of Spain, and that it had when France possessed it, and such as it should be (telle qu'elle doit etre) after the treaties subsequently entered into between Spain and other states.' And whereas in pursuance of the treaty and particularly of the third article the French Republic has an incontestable right to the domain and to the possession of the said territory; the first consul of the French Republic desiring to give to the United

(*a*) *Land Laws*, 42. 1 *Laws U. States*, 134.

States a strong proof of his friendship, doth hereby cede to the said United States in the name of the French Republic, forever and in full sovereignty the said territory with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above mentioned treaty concluded with his catholic majesty."

It will not be pretended that this language is free from ambiguity; and the probability is, from an anecdote related by one of the negotiators Barbé Marbois, in his recent work on the subject of Louisiana, that it was not accidental. It is now contended that this article reopens all the questions settled by the treaty of 1763, and acquiesced in by all parties from that period. Louisiana is no longer confined within the limits there prescribed, and Florida is to be reduced down to what France and England had before insisted was properly included within that name.

It will be remarked that France cedes to the United States what Spain had retroceded to her, upon the same conditions and subject to the same stipulations which were contained in the treaty of St Ildefonso. To that treaty reference must therefore be had to ascertain the extent of this cession. The term retrocede would seem to limit it to what had been before ceded; such is the natural and most obvious signification of the term. In this sense it is used by this Court in Johnson *vs.* M'Intosh, 8 *Wheaton*, 584, where it is said, "France ceded Louisiana to Spain, and Spain has since retroceded the same country to France. At the time both of its cession and and retrocession, &c."

But it was the province of Louisiana: was it ceded as France claimed it prior to 1763, with an extension of limits dictated by political ambition and future aspirations, rather than by actual occupancy; with vague and undefined boundaries, which had been contested by Spain in one quarter and by England throughout nearly their whole extent, or with the boundaries solemnly and deliberately settled and recognised by treaty, the concurrent act of all the parties interested? Was it that Louisiana which an ambitious monarch claimed to extend so far to the north and east as to be

intimately connected with the Canadas. and to confine the English possessions between the ocean and the Alleghany; or such as it was admitted to be when these lofty pretensions were abandoned, and its limits clearly and for the first time defined? Had the subsequent transfer to the United States never been made, our interest and our policy would have dictated an answer to these interrogatories, which reason would have sanctioned, and which argument would have confirmed. We never for a moment should have yielded to a pretension which went to unsettle our western boundary and title throughout the whole extent of the Ohio and Mississippi. But the whole character of the controversy was changed by our acquiring a new interest; and we, by virtue of the cession of Louisiana to us, claimed to the full extent of the wildest pretensions of France when in the plenitude of her power; pretensions obsolete, unwarranted, and long since formally surrendered.

But these several forms of specification are annexed to the terms of cession, and these specifications, it is submitted, were introduced with a view to limit and restrict, not to extend the generality of the previous language. 1. With the same extent that it now has in the hands of Spain. 2. And that it had when France possessed it. 3. And such as it ought to be after the treaties subsequently entered into between Spain and other countries. Such is the language of the treaty of St Ildefonso, to which the United States was no party.

1. With the same extent that it now has in the hands of Spain. We have seen that Spain from a very early period resisted the extension of Louisiana to the eastward of the Mississippi: that she was a party to the treaty of 1763, with England, then owning the Floridas, which in this country has been judicially and diplomatically considered as fixing the limits of that colony. She had acquired possession of Louisiana, in 1769,—of the whole country having that appellation; but still, with the boundaries which had been settled. When she acquired the Floridas in 1783, no change of limits was introduced. In her treaty with the United States, in 1795, they are recognised by both parties as still subsisting.

When then did Spain possess the territory in question, under the name of Louisiana? Never. The first specification then fails our opponents; and these three clauses must be considered as cumulative and concurrent; all must be complied with.

2. That it had when France possessed it. What period is referred to? Did it mean at the period when the enterprising La Salle first descended the Mississippi, which the French considered the first possession; or when a few adventurers endeavoured to establish a settlement at Biloxi, which was speedily abandoned; or when her restless monarch, stretching his influence from the northern lakes to the Gulf of Mexico, was labouring to effectuate his gigantic project of attaining the ascendancy over the entire continent? Or, was that period referred to, when compelled to surrender these lofty pretensions, she compromised with her opponents, and fixed irrevocably the bounds of her American dominions? Unquestionably, the latter. Such were the limits fixed by all the parties in interest, in 1762, 1763. It has been objected that France never did possess Louisiana to this limited extent; that she ceded it to Spain on the same day on which the preliminaries were signed, and consequently never had any title to the country with these defined boundaries. But the cession to Spain was made by a secret treaty, which has never to this day been published to the world, and which was not known to be in existence until April 1764, nor carried into execution by the transfer of possession, until August 1769. From the autumn of 1762 until August 1769, a period of near seven years, France was in possession of Louisiana, with these ascertained and settled limits; and at no other period of time were the bounds either of her settlements or her claims defined, even by herself. To this period then, this clause of the treaty must have had reference, and this construction, and this alone, will reconcile the different clauses with each other; with what is reasonable, or what is honest.

3. Such as it ought to be after the treaties subsequently entered into between Spain and other countries. It may well be doubted whether this phrase has, or was intended to

have any reference to the subject of boundary. It may more reasonably be understood to look to those stipulations which Spain had made with other nations, particularly with the United States; conceding to us the free navigation of the Mississippi, and a right of deposit at New Orleans.

If, however, it be considered as referring to the subject of boundary, what construction can it receive? Subsequently to the possession of France, Spain had entered into but two treaties which can in any manner affect the question: That of 1783, in which Great Britain ceded the Floridas to her, by virtue of which in her negotiations with the United States she claimed to carry her rights up the Mississippi, as far north as the mouth of the Yaroo; but never urged, as the proprietor of Louisiana, any rights to the eastward of the Mississippi. The treaty of 1795, already cited, was the second treaty which Spain had made, and that, as has been shown, expressly recognises the Mississippi as the common boundary of Louisiana and West Florida.

With these three clauses of description, of limitation, not of enlargement, was this territory ceded to France in 1800. Should doubts still exist as to its extent, it is reasonable that we should be allowed to remove them, by reference to the contemporaneous acts of all parties. The treaty of St Ildefonso appears to have been signed on the 1st of October 1800. The diplomatic history of our own government shows that the negotiations with France, which terminated by our acquisition of Louisiana, commenced in January 1803, and that the result was not known in the ceded country until a late period in that year. The royal order from the king of Spain for the delivery to France, was issued at Barcelona, October 15, 1802. It directs the delivery to be made to general Victor or other officer authorised by the French republic; and he is to be put in possession of "the colony of Louisiana and its dependencies, as also of the city and island of New Orleans, with the same extent that it now has, that *it had in the hands of France when she ceded it to my royal crown*, and such as it ought to be after the treaties, &c.". On the 18th of May 1803, Don Manuel de Salcedo, the governor of the provinces of Louisiana and West Florida, and the Mar-

quis de Casa Calvo, who were the commissioners to deliver the possession to the French authorities; issued their proclamation announcing the fact of cession, and that the treaty was to be "executed in the same terms that France ceded it to his majesty, in virtue of which the limits on both shores of the river St Louis or Mississippi, shall remain as they were irrevocably fixed by the 7th article of the definitive treaty of peace, concluded at Paris on the 10th of February 1763, according to which the settlements from the river Manchac or Iberville, to the line which separates the American territory from the dominions of the king, are to remain under the power of Spain, and annexed to West Florida."

The final act of delivery to the French commissioner, is dated November 30, 1803, and purports to transfer the possession "of Louisiana and its dependencies, as also of the city and island of New Orleans, to the same extent which they now possess, and which they had in the hands of France when she ceded them to the crown of Spain." These three documents have recently been submitted to congress in a communication from the president, and will shortly constitute a part of the history of the nation. The two first, which are very explicit, bear date when it was not supposed that this country would have an interest in the subject. They may be regarded as the contemporaneous exposition by both France and Spain of the language of the treaty of cession. No other power deriving interests under them, or either of of them, can question the construction which they have agreed to place upon their own agreement.

But the United States did accept a delivery of this same country as a full and complete execution of the treaty with France, and recognized by the public act of their commissioners, of December 20, 1803, th full performance by Spain of the treaty of St Ildefonso, and by France of her engagements ... the treaty of the preceding April. Two separate conventions between the United States and France were executed on the same day with the treaty of cession. The first of these (1 *L. U. S.* 140) stipulates for the payment of the consideration money for the purchase of Louisiana. The second article of this convention, and the third of the second,

make the payments to fall due after the possession of Louisiana shall be given. By making the payments, we acknowledged that France had fully complied with the engagements to put us in possession.

The general principles of law may with propriety be referred to, as furnishing the best and safest guides in the interpretation of public as well as private compacts. Both France and Spain have derived their jurisprudence from the civil code, and among all of them, this general rule will be found. "The obscurities and uncertainties of obligatory clauses, are to be interpreted in favour of the party who obliges himself: and the obligation must be restricted to the sense which lessens the obligation; for he who obliges himself, does it as little as he can, and if the other party is not satisfied, he is bound to require a clearer and fuller explanation of the meaning of the clause(*a*).

The conclusion then to which we are brought by all these different views of the subject is the same; and it is confidently submitted, that by no fair interpretation of the language of the treaty of St Ildefonso, can it be understood to have conveyed to France any portion of what was known and occupied as West Florida; and that no portion of it was ceded to the United States under the name of Louisiana.

Should it appear, however, that we have misapprehended the force of the arguments which have been presented, we claim the judgment of the Court upon other grounds.

From the year 1804 the United States claimed to give such a construction to the two treaties that have been considered, as would pass the title to the country east of the Mississippi as far as the Perdido. This claim was, however, confined to diplomatic discussion; it was not made public, no notice of it was communicated to the world, nor was it manifested by any overt act or proceeding. Until the year 1810 nothing was done to enforce this claim. During this interval, while Spain continued in the full and entire exercise of her sovereign authority over this territory, unquestioned, so far as the world could know, the grant in question

(*a*) *Domat.* Lib. I. tit. 1, Sec. 2, No. 15. 1 *Pothier on Oblig.* (*En. Ed.*) 52, 7th rule.

was concluded; the title of the plaintiffs emanated from this sovereign, de facto. In our recent controversy with Great Britain, in relation to the north eastern boundary, it appears to have been agreed by both parties to be a fundamental principle of public law and of common justice, that the acts of a sovereign power over the territory which it has ceded, are lawful until possession has been transferred(*a*). This principle has been recognised by various acts of congress, which admit the validity of grants made by France and Spain, both in the lower and upper Louisiana, up to the day when formal possession was taken by the American authorities. Upon this principle the validity of this title might be safely placed. It would be the height of injustice, for the government of the United States to annul all grants made by the Spanish functionaries, during the time that Spain occupied the country, virtually by our permission and under a claim of right.

In the year 1810, after Spain had become the scene of turbulence and revolution, and the reins of government over her colonies had dropped from her hands, when various movements were made in the Floridas, which threatened danger and inconvenience to us; the President of the United States issued a proclamation, by virtue of which this territory was occupied by the American troops. This proclamation, dated October 27, 1801, (5 *Wait's State Papers,*) although it asserts the right of the United States to the territory in question, represents it as a subject of discussion and controversy between the two governments; places the act upon the ground of an amicable proceeding, rendered necessary by the subversion of the Spanish authority; and asserts, that in the hands of the United States it would still continue "the subject of fair and friendly negotiation and adjustment." It did continue the subject of much discussion, until all the differenees between the two nations were terminated by the treaty of *February* 22, 1819(*b*). By the second article of this treaty, his catholic majesty cedes to

(*a*) Mr Clay to Mr Vaughan, 17th March 1828.
(*b*) *Land Laws*, 53.

the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. By the 8th article, all the grants of lands made before the 24th January 1818, by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty."

This is by its terms, so far as relates to these articles, a treaty of cession. The first article so purports to be; the second purports to fix limits, but its provisions are expressly confined to the territories west of the Mississippi. The preamble sets forth, that the two parties have agreed "to settle and terminate all their differences and pretensions by a treaty."

One of the most interesting of these differences respected the country lying between the Mississippi and the Perdido. Each party had pretensions to it; those pretensions had been warmly urged; numerous private rights were dependent upon the decision of them. All these matters were either settled by the treaty, or they still remain open. If settled, it is by the general terms of cession: they are sufficiently comprehensive; they embrace "all the territories which belonged to the king of Spain eastward of the Mississippi, known by the name of East and West Florida."

Had this territory continued under the power of Spain, had the United States not in 1810 occupied it by force of arms, no room for controversy would have existed. Can that act of occupation, preceded by the proclamation of Mr Madison, followed up by similar declarations, that it was not in any manner designed to preclude discussion, but to leave the question of title for subsequent adjustment unaffected by this procedure; in any manner change the relative rights of the parties, or vary the construction to be given to the treaty of 1819? Nor can our own municipal proceedings be resorted to, to aid in interpreting the treaty. Spain is not to be affected by our legislative or executive acts;

and if any thing of that kind is resorted to for the purpose of affecting the interests of her, or of her grantees, this government will stand condemned as guilty of a gross breach of good faith, and of a positive fraud upon the other contracting party.

A reference to the correspondence between the parties to the negotiation, will show that such was not their design. On the 24th October 1818, Don Onis, the Spanish minister, communicated to Mr Adams, the American secretary of state, his *project* for this stipulation in the treaty, and he proposed to cede, "in full property and sovereignty, the provinces of East and West Florida, with all their towns and forts, such as they were ceded by Great Britain in 1783, &c." The answer of Mr Adams to this communication is not published among the documents transmitted to congress on the 7th December 1818, but was afterwards made public. It will be found to contain the following explicit language. "The uselessness of any stipulation on the subject of this first proposition is further demonstrated by the nature of the second, in which you announce your authority to cede all the property and sovereignty possessed by Spain in and over the Floridas. The effect of this measure being necessarily to remove *all causes of contention* between the contracting parties with regard to the possession of those territories, and to every thing incidental to them; it would be worse than superfluous to stipulate for restoring them to Spain, in the very treaty by which they are to be ceded in full sovereignty and possession to the United States." And in a subsequent part of the same communication, it is also said in reference to the stipulations of a former treaty; "whatever relates in them to limits, or to the navigation of the Mississippi, has been extinguished by the cession of Louisiana to France, and by her to the United States; *with the exception of the line between the United States and Florida, which will also be annulled by the cession of Florida, which you now propose.*".

The project of the treaty delivered by Don Onis under date of the 9th February 1819, and the counter project of Mr Adams on the 13th of the same month, will be found in

the papers communicated by the president to congress on the 7th December 1819; and in p. 50 of the same documents will be found the remarks of M. de Neuville, who was active in his efforts to bring the parties to a settlement. "It is agreed by both parties that the article stipulating the cession of the Floridas, shall be so framed as to cover the honour of both parties, and prove that the treaty is an amicable convention, divested of all mental reservations, disguise or recrimination."

But the language of the treaty would seem to preclude all possibility of question. The cession by the king of Spain of "all the territories which belonged to him, situated to the eastward of the Mississippi, known by the name of East and West Florida," by its terms embraced the territory in question. That was known by both countries, and repeatedly called West Florida. In fact the two Floridas received their names by the same act which fixed their limits, the proclamation of 1763. In retaining those names the same boundaries were preserved, and were never departed from. Spain is equally precluded from gainsaying the words of cession, as the United States from questioning the words of description. By adopting any limitation, the treaty would not do what it purported to do; all the differences between the two nations are not composed; all the territory known by the name of East and West Florida was not ceded; mental reservations must have been made; disguises must have been assumed, and recriminations must ensue.

If this then be the true exposition of the treaty, the language of the 8th article would seem conclusive upon the case. That provides that "all the grants of land made before the 24th of January 1818, by his catholic majesty or by his lawful authorities in the said territories, ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." No distinction is made between that part of West Florida which we occupied in 1810, and that which still continued under

the authority of Spain. All are put upon the same foot; all is ceded; and all grants throughout the whole are confirmed. In De la Croix *vs.* Chamberlain, 12 *Wheat.* 599, this Court remarked, "if the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities within the disputed territory while Spain was in the actual possession of it, and concessions of a similar character within the acknowledged limits."

It was strenuously insisted in the court below, and we are apprised that the same point will be again pressed, that the judicial tribunals of the United States are precluded from investigating this question, and giving a different construction to these treaties from that which they have received from the executive and legislative departments of the government. We apprehend that the question before the Court is one of a purely legal kind. In a recent correspondence between the Spanish minister and our own executive upon the subject of these grants, the former was especially referred to these tribunals as alone competent to investigate and decide upon the question of right. An American citizen has a right to demand protection from the courts of his country against the lawless acts of the executive, and the unconstitutional proceedings of the legislature.

In the decision of this question the plaintiffs invoke the aid of treaties. They place their claim upon the language of treaties which the constitution has made the law of the land, and which cannot be annulled by the executive, or by the legislature.

But have these departments of the government assumed ground, which will in case of a favourable decision involve them in controversy with the judiciary? We have endeavoured throughout the whole argument to show that in every step we have taken we are sustained by the executive. We submit as conclusive upon the subject the executive con-

struction of the treaty of 1819, in relation to the grant made to Don Pedro de Vargas. This grant included all the land previously ungranted to the westward of the Perdido, "comprehending all the waste lands which belong or may belong to Spain, and are in dispute or reclamation with the United States according to the tenor of treaties(*a*)." This was one of the three large grants of which our government demanded, and obtained from Spain, an express act nullifying and avoiding them, as made in fraud of the 8th article of the treaty. Upon what principle was this done unless upon the admission that the lands were grantable by Spain, and that if the date was anterior to the period prescribed in the treaty, the concession would be valid to pass the title.

In reference to the acts of congress, it may well be questioned, whether any mere municipal act of domestic legislation can be legitimately appealed to for the purpose of aiding in the interpretation of treaties. They were unknown to Spain; she was in no manner bound by them, nor ought they to possess this effect.

But it is by no means apparent that any such language was used or any such intention entertained by congress. Nearly all their legislation on the subject grew out of the act of occupation in 1810, and should be construed in subordination to the language of the president's proclamation. A careful examination of these acts will show a cautious and guarded avoidance of this question. The act of March 26th 1804(*b*); sect. 1, declares "that all that portion of country ceded by France to the United States under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi river at the 33d degree north latitude and to extend west to the western boundary of said cession, shall constitute a territory of the United States under the name of the territory of Orleans." Sect. 12. "The residue of the province of Louisiana shall be called the district of Louisiana."

The act of February 20, 1811 provides in the first section, "That the inhabitants of all that part of the country or ter-

(*a*) *Land Laws*, 72.
(*b*) 3 *Laws U. States*, 603.

ritory ceded under the name of Louisiana, &c. contained within the following limits;" the first lines are to the westward of the Mississippi, which river is reached at the 33d degree north latitude; "thence down the said river to the river Iberville, and from thence along the middle of the said river and lakes Maurepas and Pontchartrain, to the Gulf of Mexico."

The act of April 8, 1812, for the admission of the state of Louisiana into the union, in its first section prescribes the same limits.

The act of April 14, 1812 is the first which professes to legislate directly upon this tract of country, and in enlarging the limits of Louisiana so as to embrace a portion of it, it styles it "all that tract of country comprehended within the following bounds," no longer employing the phraseology before applied to the undisputed country; "all that part of the territory or country ceded under the name of Louisiana."

The acts annexing other portions of this territory to Mississippi and to Alabama are equally guarded in their terms; nor am I aware of any one act of congress, which in precise and positive language calls this country a part of that which was ceded to us under the name of Louisiana.

This great and interesting question, which has heretofore been discussed diplomatically between the representatives of the two nations, where interests were involved in it, upon grounds of policy and national interest, is now presented for decision as a merely legal question. It has ceased to be a national controversy, and has assumed a shape peculiarly fitted for this tribunal.

The ultima ratio legis is to be the arbiter, instead of the ultima ratio regum. No department of the government can take exception at a decision in favour of the plaintiffs, and it is confidently hoped, that if the treaties according to their fair construction (the supreme laws of the land) by a just interpretation can sanction their title, it will here find its confirmation.

Mr Jones, for the appellees.

This case comes up for decision on the third exception,

taken by the respondent in the court below, which was sustained in that court, and the petition of the appellant there discussed.

That exception was as follows:

"For that the petitioners do not set forth any right of recovery of the land demanded by them, for that they allege that the land demanded by them, lies in a district formerly called Feliciana, within the late province of West Florida, and petitioners claim under a grant made by the Spanish governor of land situated in said district, to the person under whom they allege that they derive title, at New Orleans, on the 2d of January 1804, and subsequently confirmed by the Spanish government; whereas, all that section of country which was formerly called Feliciana, was long before the alleged date of said grant, ceded by the government of Spain to the government of France, and by the government of France to the United States; and the grant aforesaid is null and void, and has no effect whatever, and the officers making the same had not then and there any right or authority so to do."

The point then for the decision of the Court is, whether the plaintiffs, by their petition and the documents annexed, exhibit a prima facie right and title to the lands demanded by them; or according to the specific objection made by the defendant, had the Spanish governor of Louisiana any right on the 2d of January 1804, at New Orleans, to make this grant to Jayme Jorda, of $40,000 arpents, or is it in any way confirmed by any laws of the United States or of the state of Louisiana?

This question is to be solved by deciding what were the limits or boundaries of the territory ceded by Spain to France in 1800, and by France to the United States in 1803, under the name of Louisiana.

The district of country within which the lands claimed are situated, did not form part of the territory erected into a state, under the name of Louisiana. This act passed February 1811. In April 1812, congress passed an act enlarging the limits of the state; and the parish of Feliciana, within which these lands are, forms a part of this district.

This has more the appearance of a question of fact, than of law; but the parties have treated it as of the latter character, as resting on facts of a public and notorious nature, of which courts will take notice without proof. The divisions, districts and boundaries of a country are as much a matter of law, as the existence of the government, and of the Court itself. *Starkie's Ev.* Part III. 410 to 428. Part II. 164.

The question raised seems moreover to belong rather to politics than law; it rests upon the construction of a *treaty;* and of the construction of a treaty, as a general question, the government is the best judge; and where the government has decided upon a line of construction, there would be great embarrassment and ought to exist very paramount reasons, even with all the power and control given to courts under our very peculiarly organised federation, to warrant their departure from the construction given by the government.

The defendant then insists, and it is the first line of defence which he raises against the attack of the plaintiffs:

1. That it has been long since settled and established by the government of the United States, that the territory in question was ceded by Spain to France in 1800, by France to the United States in 1803; and that the courts of the United States are bound by this interpretation of that treaty.

The act authorising the President of the United States to take possession, or the act erecting Louisiana into a territory, cannot of themselves, and without the aid of extrinsic facts, decide the matter, because they no where recognize any specific limits of Louisiana: but by what authority other than the treaty of 1803, and the construction contended for by the appellee, and adopted by the government, was Mobile taken possession of in 1804, and erected into a separate revenue district, immediately on the ratification of the treaty? Act of congress of 24th February 1804, sect. 11. *Proclamation of the President*, 27th October 1810. *State Papers*, Vol. V.

Again, when in 1812 congress annexed this very territory to Louisiana, then already a state, could any thing more decisively mark and ascertain the clear construction and inter-

pretation of congress, that this district of country was ceded by Spain to France in 1800, and by France to the United States in 1803—can the courts of the United States, after such conclusive evidence of the acts of the government, consider the question as open, whether this territory was thus ceded or not?

From the acquisition of Louisiana in 1803, to the period of the conclusion of the treaty with Spain, by which Florida was ceded to the United States, there has been an uninterrupted series of legislative acts affecting the territory, which the appellants say remained the property of Spain until the Florida treaty. Cited acts of congress 2d March 1805, 21st April 1806, 3d March 1807, 3d March 1811, 12th December 1811, 25th April 1812, 12th and 18th April 1814, 3d March 1819, 11th May 1820, 8th May 1822, 27th February 1814.

All these various acts of congress clearly recognise the interpretation, that the territory in question was ceded to the Un ted States by the treaty of Paris in 1803; and the act of 25th April 1812 legislates on the subject of this identical territory by *description*, viz. territory east of the island of Orleans, and west of the Perdido: and yet the position taken by the plaintiffs in this case, calls upon this Court to decide that this territory formed no part of the United States until it was annexed to it by the treaty of Washington of 22d February 1819. Hundreds if not thousands of certificates have been issued by the land commissioners to individuals under the acts of 1819, 1822, and 1825, conferring titles, as against the United States, to lands lying within this territory, and covered by grants similar to the plaintiff's. The plaintiffs demand that all this solemn legislation, and all these judicial proceedings, are to be considered as so much usurpation on the part of the government of the United States on the rights of his Catholic majesty and his subjects. It will surely require some very cogent arguments, and a very imperious necessity of duty, to induce this Court to decide in contradiction to such a series of acts of the government. The states of Alabama and Mississippi were

created in 1817, and they also according to the doctrine, contended for by the plaintiffs, were made up of large portions of his catholic majesty's dominions: for such is the direct consequence of maintaining that the territory east of the island of Orleans and west of the Perdido, was not ceded to the United States by the treaty of 1803, but only by the treaty of 1819. It is left to the Court to imagine the consequences of such a conclusion.

The question involved in this case has been raised and decided in the state courts, viz. in Newcombe *vs.* Skipwith, 1 *Martin's Reports*, 151.

The general principle and rule of decision, that courts follow the construction put upon treaties by their governments, is laid down in the United States *vs.* Palmer, 3 *Wheat.* 610; the Divina Pastora, 4 *Wheat.* 52; Williams *vs.* Armroyd, 7 *Cranch*, 433, 434; where this Court expressly declares, that it follows the opinion of the government on a question of political law. Indeed the principle is too obviously a necessary corollary of the connection of courts of justice with the government under which they are established, to require elaborate illustration. Under this point of view, it is conceived that this Court is concluded from entertaining any other opinion, than that which has already been expressed by the government and all its citizens, except those few whose private interest induces them to cling to an exploded fallacy.

2. It is now secondly urged, that the plaintiffs are estopped by their own petition, from alleging that the territory in question was not ceded by the treaty of 1803. In order to give jurisdiction to the court, they were obliged to allege that the parish in which the immovable claimed by them lies, is within the state of Louisiana, which is the jurisdictional limit of the court. If within its jurisdictional limits, how and when did it become so? Fellciana was, as defendant insists, made part of Louisiana in 1812; but if not ceded till 1819, no law or act has been passed since that time, annexing it to, and constituting it part of the state of Louisiana; and the court below had not jurisdiction over the

subject. The allegations of the plaintiff and his reasonings are thus destructive of each other.

3. The defendant contends that if the question is gone into, historical facts and the official acts of the French and Spanish governments and a just interpretation of the treaties of 1800 and 1803, establish conclusively, that the colony or province of Louisiana was ceded to the United States, with an extent which reached on its eastern boundary to the river Perdido, and included the district in which the lands that plaintiffs claim is situated. The state papers containing the correspondence of our ambassadors, Mr Pinkney and Mr Monroe, with the Spanish ministers, embrace nearly all that can be said upon the subject. See *State Papers*, Vol. XII. p. 15 to 81, and 197 to 280. To reduce the matters there stated to some order, and to add what has since transpired, is all that will be undertaken. The object of any deduction of facts on this subject, is to show that France at some time possessed the territory in question under the name of Louisiana; if this point is established there is an end of the controversy, for Spain was bound by the treaty of St Ildefonso, made in 1800, to restore to France whatever territory was in her possession, which France had at any time held under the name of Louisiana. This is too obviously its meaning to require to be dilated upon. The words of that treaty are: "His catholic majesty promises and engages on his part to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other states." The French text is, "Sa majesté catholique promet et s'engage de son côté, à rétrocéder à la republique Française, six mois après l'exécution pleine et entière des conditions et stipulations ci-dessus, relatives à son altesse royale le Duc de Parme, la colonie ou province de la Louisiane, avec la même étendue qu'elle a actuellement entre les mains de l'Espagne, et qu'elle avait lorsque la France la possédait, et

telle qu'elle doit être, d'après les traités passés subséquemment entre l'Espagne et d'autres etats.

It was ceded by France to the United States in the same terms.

Did France then, at any time, ever possess any territory as far or farther to the east of the island of Orleans as the present parish of Feliciana, viz. the territory between the river Mississippi and the eastern branch of Pearl river?

The discovery of Louisiana by La Salle in 1682; his unsuccessful attempt to form a settlement at Rio Colorado de Texas in 1685; the expedition and settlement of Iberville in 1699, at Dauphin Island and Biloxi, where he remained governor for twenty-three years, and exhibited a character for enterprize and perseverance, which has not been surpassed; are clothed with the character of historical events; and this spot, far eastward of the present state, was the first to receive the name of Louisiana. It was twenty-three years after the period of the settlement of the French at Dauphin Island and Biloxi, before the head quarters of the province were moved to the banks of the Mississippi. At the barren and inhospitable Biloxi, Iberville, constrained by orders, maintained his government long after his own judgment was convinced that the fertile bank of the Mississippi was destined to be the site of an immense metropolis. These events, and the general settlement of the country, are minutely detailed in a recent publication, and the authorities from which they are taken, are referred to. *Martin's History of Louisiana*, Vol. I. from page 122 to page 300, who cites *Charlevoix*, *Laharpe*, *Vergennes*, *Dupratz*, and the records of the country.

That France always gave a limit to Louisiana, which embraced the territory in question, may be further seen by the grant to Crozat, made in 1712, in which Crozat is appointed solely to carry on trade, "in all the lands possessed by us, and bounded by New Mexico and the lands of the English Carolina, all the establishments, ports, havens, rivers, and principally the port and haven of the island of Dauphin, heretofore called Massacre; the river of St Louis, heretofore called Mississippi; from the edge of the sea, as far as Illinois,

together with the river of St Philip, heretofore called the Missourys; and of St Jerome, heretofore called Ouabache; with all the countries, territories, lakes, within land, and the rivers which fall directly and indirectly into that part of St Louis."

The manner in which France dispossessed herself of Louisiana in favour of Great Britain and Spain by the treaty of 1763, ceding the part of Louisiana east (to the left) of the island of Orleans to Great Britain, and the island of Orleans and the part of Louisiana west of the Mississippi to Spain; the consolidation of the part of Louisiana thus acquired by England with other territory ceded to her by Spain in 1763, which consolidation constituted the province of West Florida; and the subsequent acquisition by Spain of West Florida, thus embracing part of Louisiana, in 1783, are so fully and explicitly detailed in the correspondence of our ministers, contained in the state papers at the place cited, in the reasons given for the judgment of the court, and in the extract from the treatise on American diplomacy, that it would only lead to repetition to anticipate them. For the same reason the Court is referred to these extracts for a critical analysis of the language of the treaty, from which it will be found that to consider the territory in question as ceded by Spain to France, and by France to the United States is the only key to the peculiar and otherwise inexplicable phraseology of these treaties. That this peculiar phraseology applied to the dimensions of the territory to be ceded rather than to any other modifications it had undergone by treaty, is clearly deduced from the terms used. His catholic majesty retrocedes to France, " the colony or province of Louisiana with *the same extent* that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other states."

The words *the same extent* are to be understood as applying to each member of the sentence, viz. with the same extent that it now has in the hands of Spain, and with the same extent that it had when France possessed it, and with such extent as it has or ought to have after the treaties sub-

sequently entered into between Spain and other states; this is obviously the meaning of this peculiar phraseology, and it is confirmed by adverting to the French text, where the word *telle* is placed in the feminine to accord with *étendue*, the last preceding substantive. From these premises, there can be no doubt that the learned judge of the court of the first instance is fully borne out and supported in the conclusion that the country east of the island of Orleans, including Mobile, &c. to the Perdido, was from 1682 to 1763 in possession of France under the name of Louisiana; that it was ceded and intended to be ceded to her again by Spain in 1800, and by France to the United States in 1803. The arguments *pro* and *con* on this subject are well summed up in a publication entitled, *Diplomacy of the United States*. From this work it appears, that during the negotiations which ended in the peace of 1783 at an unsuspicious moment, Spain herself admitted that the country bordering on the east side of the Mississippi, previous to the war of 1756, belonged to France.

This law lays down the principle, that where there are two purchasers from the same vendor, who have both paid the price, he who gets first into possession is to be maintained in the title. To prepare for the application of this law, it is laid down, that nations are mere moral beings, and that they are to be governed in all the contracts which they enter into among them, by the same rules by which contracts of the same nature are governed, when entered into between private persons.

It is further assumed, that the United States are a mere purchaser from France; and plaintiffs' grantee, in like manner, a purchaser from Spain, who was in the actual administration of the country. It is next asserted, or sought to be inferred, that plaintiffs' grantee was put in actual possession of his grant, before the United States took actual possession, in December 1803, and therefore, under the aforementioned rule of law, has a better title than the United States, or any persons deriving claim under them.

The sophistry of comparing a cession by treaty, between nations, to an ordinary bargain and sale, and applying the

rules of law as to property among individuals to the transactions among nations, is almost too obvious to require refutation.

An act, erecting Louisiana into two territories, passed 26th March 1804.

The 14th section of that act annuls all grants made within the ceded territory, subsequent to the treaty of St Ildefonso, except to actual settlers, &c.

No law of the United States has passed exempting grants such as that under which plaintiffs claim, from the nullity with which they are struck by this section of that law. For,

1. This grant violates the usual powers vested in a governor, and the laws, usages and customs of the Spanish government on this subject, in granting so large a quantity of land; and hence the ratification of the king was sought and obtained, but at too late a period to confer a title.

2. No actual settlement is pretended or alleged.

3. The grant exceeds a league square.

It is not a little singular for the good faith of these large grants, that they are all located precisely between the Mississippi and the Perdido, all hurried through with the speed of lightning, compared with the usual pace of Spanish authorities, and made about the same period of time. That the payments are not in *money* but in *certificates* of credits, issued by the minister of finance.

That the grant itself expressly declares the land to be within the province of Louisiana, for the caption is, *Luisiana, Distrito de Baton Rouge;* that it is issued by Morales, while he yet remained at New Orleans. With these concurring facts, it is not surprising that the government of the United States have refused to confirm eight or ten grants, which embrace 500,000 acres of land.

After the liberal course of proceeding on the part of the United States, in relation to grants, up to the very period that possession was taken by her, after the long usurped retention of it by Spain, the Court, or any one else, can feel no commiseration either for the original grantees, parties to such gross frauds, or for speculating purchasers of doubtful titles. Technicalities sometimes serve as handmaids to

justice; they may also be wisely used to defeat fraud; and the claim of the plaintiffs is of such a nature, and entitled to so little favour, that the Court would decide against it, even if they were obliged to rest their decision on a rigid technicality. Even if it were necessary to resort to *summum jus* to extinguish it, it would work nothing but *summa justitia*. But this is not necessary. The plaintiffs' title vanishes on the application of the plainest principles of law, and the most ordinary rules of decision.

To any argument predicated on the ground, that Spain, being in actual possession, had a right to make grants, it may be answered,

1. That from the 1st of October 1800, the country belonged to France, who transferred it to the United States in 1803, as she received it by cession from Spain. If France permitted it to be governed by Spanish authorities, from want of ability to take possession, or motives of convenience, the Spanish authorities could not go beyond mere acts of administration, viz. such as were necessary to maintain the bond of society; they were not at liberty to dispose of the public domain at their own will and pleasure; or to fill their coffers by its sale. To this extent alone, is any succeeding government held by the general principles of political law, (independent of special conventions) to recognise the acts of their predecessors, who have acted the *de facto* without being the *de jure* government. The United States succeeded to the rights of France, and France was not bound to recognise acts similar to these, done after the date of the acquisition. It is not considered that the 3d article of the treaty, which secures the protection and enjoyment of property, is any limitation on the first article which transfers the province as fully, and in the same manner in which France received it from Spain. But even had it been justice and equity to recognise all ordinary acts of administration, still, every act which was in fraud of the real owner, he might disavow and refuse to ratify; these large grants of land, so unusual, and at variance with the ordinary Spanish regulations on this subject, carry too strongly on their front their character, to entitle them to any favour.

The government of the United States has, as we have seen, gone very far in recognising every species of title which had the presumption of fairness, that emanated from the Spanish authorities, prior to the taking possession of the country, on the 20th of December 1803, and even up to 1810; but they have guarded their liberality from abuse, by imposing various reasonable conditions, within which the plaintiffs' claim does not come.

The acquisition of the United States was made in April 1803, and no step was taken towards originating this title till October 1803, long after we may fairly presume the knowledge of the transfer was made public. The United States had the right, and they have exercised it, to refuse to ratify every such grant made after their title was acquired, and *a fortiori* after it was known; and they have always refused to give any colour or shadow of legal right to claims of the magnitude of that under the wings of which plaintiffs seek to cover the tract of land in dispute, conceiving them to have been issued in fraud of their rights of sovereignty.

The circumstance therefore of the petition and order of survey being made *anterior* to the taking possession by the United States, but *posterior* to the cession and while Spain was in actual possession; cannot confer on the plaintiffs any right, if the United States, as they have uniformly done, refuse to ratify an incomplete title, which as sovereign they may refuse to do.

2. As to all titles which emanate from the sovereign, and are set up against the sovereign himself, it is the government alone which can through its tribunals determine on such claims.

The United States have instituted tribunals to decide all claims to lands, of whose want of liberality in confirming titles there has been no complaint; except by a few individuals whose claims are judged to have originated in fraud of the rights of the United States. The claim of the plaintiffs has been presented for record and confirmation; but it has not been approved or confirmed by the commissioners, or we should have heard such approval and confirmation alleged in the petition. The United States have given away

these very lands, and by doing so have not only manifested their liberality and wise policy, but conferred rights and created interests which, from the extent and variety of the persons interested, ought not now to be affected; unless indeed the strictly impartial scale of justice preponderates against them, when indeed they must be extinguished even if the sword of justice be necessary to enforce the decree. Of such a result we have little apprehension, sustained as we are by such a mass of legislation and the substantial rules of political law.

The question submitted in this case was glanced at, la Croix *vs.* Chamberlain, 12 *Wheaton*, 599. That case was decided on the technical ground, that an imperfect title could not sustain an action of ejectment. The same objection might exist in this case, if the acts of the Spanish governor and king are considered as without authority over the territory described after 1803. But the case is adverted to, principally with a view to an opinion advanced, as we presume by the deciding judge; for it is not a necessary reason for, or pivot of the decision of the Court.

The references to the acts of congress, already given, show with what limitations the United States have confirmed titles which had their commencement after October 1800, viz. the date of the treaty of St Ildefonso; that it is only grants limited as to quantity, viz. a league square, and which were accompanied by settlement, and considered by the commissioners to have commenced in good faith, which were thus confirmed. As to any grants which originated after October 1800, conferring titles to land to an extent exceeding a league square, the 14th section of the act of 1804 at once annuls them, and no subsequent law has withdrawn its withering effect. This and the subsequent acts clearly show, that the United States considered that the cession by Spain to France, put an end to the power of Spanish officers, to make grants of land; and this doubtless was the strict law of the case. The possession of Spain after 1800, was not a possession *as owner*. Her officers could therefore only do administrative and conservative acts; and not acts of pure sovereignty. It is respectfully insisted, that the United

States drew a *clear distinction as to dates*, permitting grants, prior to 1800, to rest on their proper legality for validity; but constituting themselves into judges of all grants made subsequent to that period. They have confirmed all acts done, or grants made after October 1800, up to 1803; where, from the minuity or contracted dimensions, they carried presumptive proof, that they were made in the ordinary exercise of sovereignty, and in good faith, at least on the part of the grantees. They have even carried this liberality in favour of such grants, made prior to 1810, when the country was actually taken possession of. Joydra's patent comes within no one of the confirming acts.

The plaintiffs must either succeed in establishing that Louisiana was bounded on the east by the Iberville and the lakes, or their grant falls to the ground. When the plaintiffs invoke the aid of the treaty of 1819, it is by assuming that the ground of dispute was not included in Louisiana, under the cession of 1803. We have, as we apprehend, clearly refuted this position. The treaty of 1819 has substance enough for its application, in the use of the terms, West Florida, in the territory actually ceded, viz. the portion of West Florida, between the Perdido and the Apalachicola, to render unnecessary the establishment of a principle which would stamp with usurpation and injustice so large a portion of federal legislation, and annihilate the original legality of the rights of thousands in the states of Alabama, Mississippi and Louisiana.

It is not therefore on such a title as the one presented by plaintiffs, predicated on a petition and order of survey for forty thousand arpents of land, made after the cession, which took place in April 1803, and of which the title was not completed till January and May 1804 and 1805, unaided by any sanction of the government of the United States, and in the very teeth of its laws; that the plaintiffs can recover. In the words of the exception, the grant or patent was made by persons who had not at the time any authority to grant lands within that district. The plaintiffs show no legal title to the lands claimed by them.

Subsequent acts of congress have established land offices

in the territory of Florida, westward of the Perdido; but the disputed territory remains part of the states of Mississippi, Alabama and Louisiana, under acts of congress which recognise it as ceded by the treaty of 1803. There is certainly manifested in the pretensions of the plaintiffs in setting up this title, a gratifying instance of the latitude of legal discussion permitted under our free institutions; but there is something hopeless in the supposition that courts of justice might by possibility entertain an opinion different from the one so early taken and so long persevered in by the government, and by which no palpable contradiction or absurdity is maintained: the judiciary must be considered as bound to follow the twenty years interpretation given by their government to a treaty made by them. Even under our very peculiar form of government, it would be a singular instance of *imperium in imperio*, if the judiciary and the government were found deciding such a question in different ways.

Mr Webster, for the appellants, in reply.

The question for the decision of the Court is, whether the lands sued for by the petitioners are a part of the province of Louisiana, as that province was ceded by France to the United States; or are a part of West Florida, as that province was ceded by Spain to the United States. If a part of Louisiana; then the lands were public domain, and now belonged to the United States or her grantees. If a part of Florida; then the grant under which the plaintiff derives title is good, and he is entitled to recover.

Louisiana, as the United States received it from France, was bounded on the east, either by the Iberville and the lakes, or by the Perdido; no other or intermediate boundary is set up. If the United States obtained their title from France, they have both soil and jurisdiction; if under Spain, they have the jurisdiction but not the soil.

What was the extent then of the grant from France to the United States of April 30th, 1803? The grant was of the province of Louisiana; it stated no boundaries, nor limits, but it referred to the title of France, that is, to the treaty of St Ildefonso. The words of this treaty have been frequently

repeated in the course of the argument. That treaty then is to be looked at and considered.

That treaty retrocedes to the colony or province of Louisiana; 1. With the same extent which it now has in the hands of Spain. 2. That it had when France possessed it. 3. And such as it ought to be, after the treaties subsequently entered into between Spain and other states.

How then is this treaty to be construed?

1. In the first place we must look at the condition and state of the country as they then were. From November 1762, a period of thirty-eight years, Spain had owned Louisiana; she had been in the actual possession of it from 1769, a period of thirty-one years. During all this time, she had possessed it as bounded on the east side by the lakes. From 1763 to 1783 England had owned the territory on the left bank, under the appellation of Florida. For twenty years England and Spain occupied respectively, each its own territory, with boundaries settled by treaty and well understood. In 1783 Spain obtained the territory on the left bank from England, but she obtained it as *Florida*. As such it was ceded to her, and as such she received it. From 1783 to 1800, seventeen years, she owned both banks; but she owned one as *Louisiana*, and the other as *Florida*. This is perfectly clear as matter of fact; and the provinces were as well known, and divided by lines as certain, as are the provinces of Spain at home.

For forty years not one foot of land east of the Iberville had been treated by her as part of Louisiana. Her laws, her ordinances, her colonial governments, her archives, her administration, all recognise the distinction between Lou isiana and Florida.

This is the great leading consideration; it is entirely unquestionable as matter of fact, and quite important in the argument.

Louisiana, then, at that time was as clearly defined in its boundaries, at least on the east, as Estramadura or Andalusia. All this was known to France: 1st, because it was known to every body; and 2d, because these were the limits with which France herself had ceded Louisiana to Spain.

Under these circumstances, the treaty of St Ildefonso was made.

1. It cedes "the colony or province of Louisiana." This of itself is a sufficient description; if nothing more had been said, the colony would have passed, with its then known and established boundaries, as much so as if it had been Castille or Arragon. If it had stopped here, would there have been any doubt? Certainly none.

This is very important; because if the grant thus far is clear, then it is not to be affected by any thing in itself less clear; if all that follows, taken together, be ambiguous, then it ought not to control the preceding, which is free from ambiguity. That would be worse than to illustrate the obscure by the obscure; it would be to obscure the clear by the obscure. *Vattell*, Book II. Ch. XVII. upon the interpretation of treaties, interprets the obscure, so that it agrees with what is clear and plain. Therefore if all that follows, taken together, is doubtful, it is all to be rejected.

2. But properly considered, what follows is not doubtful.

There are two ways in which these three modes of description may be considered; and each will lead to the same result. 1. They may be viewed as explanatory of each other, or as synonymous phrases. This probably is the true mode of regarding them. 2. Or as qualifying and limiting each other.

1. It is natural to consider them as synonymous. They are copulative; they are evidently used as synonymous. Take the two first; "Louisiana is to be ceded *as* Spain *now* holds it, and *as* France *held* it." Does not this form of expression imply that the extent was the same in both cases? If the extent was *different*, then both could not be true. Yet both are used, and the inference therefore is, that they were used as synonymous.

If the extent had been different, then the language would have been *not as Spain now holds it, but* as France *held* it.

The fair import of the expression is, that they mean the same thing; or were *intended* to express the same thing. Now if these expressions appear in any degree inconsistent with themselves, what is the rule to be applied to them?

Clearly, it is to find out, if we can, one which is clear and certain, and make the rest conform to it. This is the rule of common sense. Now there is one of these descriptions perfectly clear, unambiguous, and free from doubt; and that is entitled to control all the rest. Because it corresponds precisely with what *precedes* in the treaty; because it is first, and leading in the order of arrangement; because in itself it is perfectly distinct and intelligible.

There is no doubt how the treaty would have stood, if it had stopped there.

The doctrine contended for on the other side, overrules the plain expressions of this provision. They contend Louisiana shall not have the same extent as in the hands of Spain; they control what is clear, by what is doubtful.

But it is further evident, that two of these clauses completely agree, the first and the last; "such as Spain now holds it," and "such as it ought to be after the treaties made by her;" these are precisely the same thing.

Then, if these expressions were used as mutually explanatory, as different modes of expressing the same thing; how are two of them which are clear, and which do agree, to be explained away by the third, which is doubtful? These two are almost identical, "such as Spain now holds it," and "such as it ought to be after the treaties made by her."

Then we come to what has raised the doubt; "or as it was when France possessed it." Now this expression may be doubtful, or might be if it stood alone, especially if it be admitted that France possessed Louisiana a long time, and that at different periods, it had a different extent in her hands.

The object is to fix the period of her possession, to which this refers.

Let it be admitted, for the present, that it had a different extent at different periods. Was there any period when, by acknowledgment, she held it bounded east by the Mississippi? There certainly was; viz. the moment of its actual delivery to France in 1769. For seven years, it had no other boundary but the Iberville.

But it is enough to say she so possessed it, in 1762 and

1763; and so ceded it, when she held the whole of Louisiana. It is then to that moment that these words are to refer; it then went into the possession of France to the full extent now claimed by the petitioners; because in this way the article is reconciled in all its parts.

But there is a stronger ground. It is quite clear, from the treaty itself, that it refers to the possession of France, at the moment after the cession. The third clause makes this manifest; "and such as it ought to be, after the treaties subsequently made by Spain," &c.

Now here are treaties spoken of as made by Spain, *subsequent to this possession of France.* Not treaties by France and Spain, but treaties by *Spain* alone. This necessarily fixes the period to be that of the cession; for before that time Spain could not affect Louisiana by treaties.

Does the treaty mean after the treaties entered into by Spain, subsequent to Lasalle's voyage in 1682; or the primitive possession of France?

It is, therefore, confidently asserted, that it is not only an admissible, but the only admissible construction of the clause, as the time of possession by France referred to in the treaty was the moment of her cession. But there is another mode of considering these clauses; and that is not to regard them as synonymous, but as qualifying and limiting each other; and this will lead the Court to the same result.

Thus far the subject has been considered, as if there were *three* clauses, or phrases of description.

But it is suggested that there are but two, the two first being in fact but one. The form of expression justifies this construction; "with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it ought to have been by subsequent treaties."

The first sentence states the same thing, and the last *qualifies it.* The meaning is, take the colony as you hold it, and as I receive it from you, subject to any treaties since made by me. The punctuation shows this, as well as the phrase, and manner of expression.

If this construction, which appears to be the right one,

be adopted, the result will be the same; viz. that the time of possession referred to, was the time of the cession to Spain.

But we may go further and contend, that no reasonable argument can be found for carrying back this possession to early history; in short, that France never did possess West Florida, as part of Louisiana, within the meaning of words used as these words are.

She claimed it indeed, but she never possessed it. She had a settlement here and there, with an undefined claim. She claimed it, but no treaty acknowledged it, and it was always disputed until 1763. 12 *Wheaton*, 522.

It was certainly one object of that treaty to settle the limits of Nova Scotia; and the fair construction of the article is, that it fixes boundaries; and that it purports to cede territory, does not alter the nature or intent of it. There were words of cession, because France had a settlement at Dauphin Island. On the 3d of November 1762, by private treaty, France ceded Louisiana to Spain—all Louisiana; and by a treaty with England, she ceded the country east of the Mississippi to England.

At the time of the definitive treaty of 10th February 1763, Spain owned Louisiana under the treaty of November preceding; and now she cedes Florida to England, and all her possessions *east* of the Mississippi. This was certainly a designation of limits.

How did the parties understand the treaty of 1763? The letter to L'Abbadie, 1 *Laws U. S.* 442, shows that it was considered that the whole of Louisiana was the property of Spain; and then, 1763, it was admitted that the the whole of Louisiana lay west of the Mississippi; and in 1763, Spain, recovering the left bank of the river from England, received it as *Florida*. It may be emphatically inquired whether it is reconcilable to sound principles, to go back to the times of uncertain and contentious claims, or to the time of fixed and acknowledged rights. A contemporaneous exposition of the treaty of St Ildefonso is obtained from the acts of the parties to that treaty. When on the 30th November 1803, Spain delivered Louisiana to France, she delivered nothing on the eastern side of the river.

[Foster & Elam vs. Neilson.]

The history of the title of the United States to Louisiana will illustrate and confirm the views which have been exhibited in this investigation.

In 1795 the United States made their treaty with France. Difficulties soon after arose on the subject of the navigation of the Mississippi, and the peace of the two countries was in danger from these difficulties. In 1801 or 1802, we heard of the transfer of Louisiana to France, and we were alarmed at the prospect of the armies of a powerful and successful nation landing in our neighbourhood.

Before it was known that France had become the owner of Louisiana, we were anxious to obtain Florida; but as soon as this became known every effort was directed to purchase Louisiana from France, or so much of it as would secure to the flourishing and enterprising western population of our country, the free use of the magnificent river Mississippi,—their right by all the laws of nature. The treaty of April 1803 gave the whole of Louisiana to the United States; that treaty reciting the treaty of San Lorenzo.

How did we receive the acquired territory? Did we then suppose we had obtained any thing east of the Mississippi?

When Claiborne and Wilkinson took possession they received Louisiana, extending only as asserted by the appellants; and they asked for no more.

Mr Chief Justice MARSHALL delivered the opinion of the Court.

This suit was brought by the plaintiffs in error in the court of the United States, for the eastern district of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpents of land, made by the Spanish governor, on the 2d of January 1804, to Jayme Joydra, and ratified by the king of Spain on the 29th of May 1804. The petition and order of survey are dated in September 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which

they can recover; that the territory, within which the land claimed is situated, had been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this Court by a writ of error.

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

This question has been repeatedly discussed with great talent and research, by the government of the United States and that of Spain. The United States have perseveringly and earnestly insisted, that by the treaty of St Ildefonso, made on the 1st of October in the year 1800, Spain ceded the disputed territory as part of Louisiana to France; and that France, by the treaty of Paris, signed on the 30th of April 1803, and ratified on the 21st of October in the same year, ceded it to the United States. Spain has with equal perseverance and earnestness maintained, that her cession to France comprehended that territory only which was at that time denominated Louisiana, consisting of the island of New Orleans, and the country she received from France west of the Mississippi.

Without tracing the title of France to its origin, we may state with confidence that at the commencement of the war of 1756, she was the undisputed possessor of the province of Louisiana, lying on both sides the Mississippi, and extending eastward beyond the bay of Mobile. Spain was at the same time in possession of Florida; and it is understood that the river Perdido separated the two provinces from each other.

Such was the state of possession and title at the treaty of Paris, concluded between Great Britain, France, and Spain, on the 10th day of February 1763. By that treaty France ceded to Great Britain the river and port of the Mobile, and all her possessions on the left side of the river Mississippi, except the town of New Orleans and the island on which it

is situated: and by the same treaty Spain ceded Florida to Great Britain. The residue of Louisiana was ceded by France to Spain, in a separate and secret treaty between those two powers. The king of Great Britain being thus the acknowledged sovereign of the whole country east of the Mississippi, except the island of New Orleans, divided his late acquisition in the south into two provinces, East and West Florida. The latter comprehended so much of the country ceded by France as lay south of the 31st degree of north latitude, and a part of that ceded by Spain.

By the treaty of peace between Great Britain and Spain, signed at Versailles on the 3d of September 1783, Great Britain ceded East and West Florida to Spain: and those provinces continued to be known and governed by those names, as long as they remained in the possession and under the dominion of his catholic majesty.

On the 1st of October in the year 1800, a secret treaty was concluded between France and Spain at St Ildefonso, the third article of which is in these words: "His catholic majesty promises and engages on his part to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and the other states."

The treaty of the 30th of April 1803, by which the United States acquired Louisiana, after reciting this article, proceeds to state, that "the first consul of the French republic doth hereby cede to the United States, in the name of the French republic, forever and in full sovereignty, the said territory with all its rights and appurtenances as fully and in the same manner as they have been acquired by the French republic, in virtue of the above mentioned treaty concluded with his catholic majesty." The 4th article stipulates that "there shall be sent by the government of France a commissary to Louisiana, to the end that he do every act necessary, as well to receive from the officers of his catholic

majesty the said country, and its dependencies, in the name of the French republic, if it has not been already done, as to transmit it in the name of the French republic to the commissary or agent of the United States."

On the 30th of November 1803, Peter Clement Laussatt, colonial prefect and commissioner of the French republic, authorised, by full powers dated the 6th of June 1803, to receive the surrender of the province of Louisiana, presented those powers to Don Manuel Salcedo, governor of Louisiana and West Florida, and to the marquis de Casa Calvo, commissioners on the part of Spain, together with full powers to them from his catholic majesty to make the surrender. These full powers were dated at Barcelona the 15th of October 1802. The act of surrender declares that in virtue of these full powers, the Spanish commissioners, Don Manuel Salcedo and the marquis de Casa Calvo, "put from this moment the said French commissioner, the citizen Laussatt, in possession of the colony of Louisiana and of its dependencies, as also of the town and island of New Orleans, in the same extent which they now have, and which they had in the hands of France when she ceded them to the royal crown of Spain, and such as they should be after the treaties subsequently entered into between the states of his catholic majesty and those of other powers."

The following is an extract from the order of the king of Spain referred to by the commissioners in the act of delivery. "Don Carlos, by the grace of God, &c." "Deeming it convenient to retrocede to the French republic the colony and province of Louisiana, I order you, as soon as the present order shall be presented to you by general Victor or other officer duly authorised by the French republic, to take charge of said delivery; you will put him in possession of the colony of Louisiana and its dependencies, as also of the city and island of New Orleans, with the same extent that it now has, that it had in the hands of France when she ceded it to my royal crown, and such as it ought to be after the treaties which have successively taken place between my states and those of other powers."

Previous to the arrival of the French commissioner, the

governor of the provinces of Louisiana and West Florida, and the marquis de Casa Calvo, had issued their proclamation, dated the 18th of May 1803; in which they say, "his majesty having before his eyes the obligations imposed by the treaties, and desirous of avoiding any disputes that might arise, has deigned to resolve that the delivery of the colony and island of New Orleans, which is to be made to the general of division Victor, or such other officer as may be legally authorised by the government of the French republic, shall be executed on the same terms that France ceded it to his majesty; in virtue of which, the limits of both shores of the river St Louis or Mississippi, shall remain as they were irrevocably fixed by the 7th article of the definitive treaty of peace, concluded at Paris the 10th of February 1763, according to which the settlements from the river Manshac or Iberville, to the line which separates the American territory from the dominions of the king, remain in possession of Spain and annexed to West Florida."

On the 21st of October 1803, congress passed an act to enable the president to take possession of the territory ceded by France to the United States; in pursuance of which commissioners were appointed, to whom Monsieur Laussatt, the commissioner of the French republic, surrendered New Orleans and the province of Louisiana on the 20th of December 1803. The surrender was made in general terms; but no actual possession was taken of the territory lying east of New Orleans. The government of the United States, however, soon manifested the opinion that the whole country originally held by France, and belonging to Spain when the treaty of St Ildefonso was concluded, was by that treaty retroceded to France.

On the 24th of February 1804, congress passed an act for laying and collecting duties within the ceded territories, which authorised the president, whenever he should deem it expedient, to erect the shores, &c. of the bay and river Mobile, and of the other rivers, creeks, &c. emptying into the gulph of Mexico east of the said river Mobile, and west thereof to the Pascagoula inclusive, into a separate district, and to establish a port of entry and delivery therein. The

port established in pursuance of this act was at fort Stoddert, within the acknowledged jurisdiction of the United States; and this circumstance appears to have been offered as a sufficient answer to the subsequent remonstrances of Spain against the measure. It must be considered, not as acting on the territory, but as indicating the American exposition of the treaty, and exhibiting the claim its government intended to assert

In the same session, on the 26th of March 1804, congress passed an act erecting Louisiana into two territories. This act declares that the country ceded by France to the United States south of the Mississippi territory, and south of an east and west line, to commence on the Mississippi river at the 33d degree of north latitude and run west to the western boundary of the cession, shall constitute a territory under the name of the territory of Orleans. Now the Mississippi territory extended to the 31st degree of north latitude, and the country south of that territory was necessarily the country which Spain held as West Florida; but still its constituting a part of the territory of Orleans depends on the fact that it was a part of the country ceded by France to the United States. No practical application of the laws of the United States to this part of the territory was attempted, nor could be made, while the country remained in the actual possession of a foreign power.

The 14th section enacts "that all grants for lands within the territories ceded by the French republic to the United States by the treaty of the 30th of April 1803, the title whereof was at the date of the treaty of St Ildefonso in the crown, government, or nation of Spain, and every act and proceeding subsequent thereto of whatsoever nature towards the obtaining any grant, title or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and to have been from the beginning, null, void, and of no effect in law or equity." A proviso excepts the titles of actual settlers acquired before the 20th of December 1803, from the operation of this section. It was obviously intended to act on all grants made by Spain after her retrocession of Louisiana to France, and

without deciding on the extent of that retrocession, to put the titles which might be thus acquired through the whole territory, whatever might be its extent, completely under the control of the American government.

The president was authorised to appoint registers or recorders of lands acquired under the Spanish and French governments; and boards of commissioners who should receive all claims to lands, and hear and determine in a summary way all matters respecting such claims. Their proceedings were to be reported to the secretary of the treasury, to be laid before congress for the final decision of that body.

Previous to the acquisition of Louisiana, the ministers of the United States had been instructed to endeavour to obtain the Floridas from Spain. After that acquisition, this object was still pursued, and the friendly aid of the French government towards its attainment was requested. On the suggestion of Mr Talleyrand that the time was unfavourable, the design was suspended. The government of the United States however soon resumed its purpose; and the settlement of the boundaries of Louisiana was blended with the purchase of the Floridas, and the adjustment of heavy claims made by the United States for American property, condemned in the ports of Spain during the war which was terminated by the treaty of Amiens.

On his way to Madrid, Mr Monroe, who was empowered in conjunction with Mr Pinckney, the American minister at the court of his catholic majesty, to conduct the negotiation, passed through Paris; and addressed a letter to the minister of exterior relations, in which he detailed the objects of his mission, and his views respecting the boundaries of Louisiana. In his answer to this letter, dated the 21st of December 1804, Mr Talleyrand declared, in decided terms, that by the treaty of St Ildefonso, Spain retroceded to France no part of the territory east of the Iberville which had been held and known as West Florida; and that in all the negotiations between the two governments, Spain had constantly refused to cede any part of the Floridas, even from the Mississippi to the Mobile. He added that he was authorized by his imperial majesty to say, that at the be-

ginning of the year 1802, general Bournonville had been charged to open a new negotiation with Spain for the acquisition of the Floridas; but this project had not been followed by a treaty.

Had France and Spain agreed upon the boundaries of the retroceded territory before Louisiana was acquired by the United States, that agreement would undoubtedly have ascertained its limits. But the declarations of France made after parting with the province cannot be admitted as conclusive. In questions of this character, political considerations have too much influence over the conduct of nations, to permit their declarations to decide the course of an independent government in a matter vitally interesting to itself.

Soon after the arrival of Mr Monroe at his place of destination, the negotiations commenced at Aranjuez. Every word in that article of the treaty of St Ildefonso which ceded Louisiana to France, was scanned by the ministers on both sides with all the critical acumen which talents and zeal could bring into their service. Every argument drawn from collateral circumstances, connected with the subject, which could be supposed to elucidate it, was exhausted. No advance towards an arrangement was made, and the negotiation terminated, leaving each party firm in his original opinion and purpose. Each persevered in maintaining the construction with which he had commenced. The discussion has since been resumed between the two nations with as much ability and with as little success. The question has been again argued at this bar, with the same talent and research which it has uniformly called forth. Every topic which relates to it has been completely exhausted; and the Court by reasoning on the subject could only repeat what is familiar to all.

We shall say only, that the language of the article may admit of either construction, and it is scarcely possible to consider the arguments on either side, without believing that they proceed from a conviction of their truth. The phrase on which the controversy mainly depends, that Spain retrocedes Louisiana with the same extent that it had when France possessed it, might so readily have been expressed

in plain language, that it is difficult to resist the persuasion that the ambiguity was intentional. Had Louisiana been retroceded with the same extent that it had when France ceded it to Spain, or with the same extent that it had before the cession of any part of it to England, no controversy respecting its limits could have arisen. Had the parties concurred in their intention, a plain mode of expressing that intention would have presented itself to them. But Spain has always manifested infinite repugnance to the surrender of territory, and was probably unwilling to give back more than she had received. The introduction of ambiguous phrases into the treaty, which power might afterwards construe according to circumstances, was a measure which the strong and the politic might not be disinclined to employ.

However this may be, it is, we think, incontestable, that the American construction of the article, if not entirely free from question, is supported by arguments of great strength which cannot be easily confuted.

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the Court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over her colonies; and a degree of disorder prevailed

in the Floridas, at which the United States could not look with indifference. In October 1810, the president issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion, which was rendered necessary in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

In April 1812, congress passed "an act to enlarge the limits of the state of Louisiana." This act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the state of Louisiana.

In May of the same year, another act was passed, annexing the residue of the country west of the Perdido to the Mississippi territory.

And in February 1813, the president was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not now in possession of the United States."

On the third of March 1817, congress erected that part of Florida which had been annexed to the Mississippi territory, into a separate territory, called Alabama.

The powers of government were extended to, and exercised in those parts of West Florida which composed a part of Louisiana and Mississippi, respectively; and a separate government was erected in Alabama. *U. S. L.* c. 4, 409.

In March 1819, "congress passed an act to enable the people of Alabama to form a constitution and state government." And in December 1819, she was admitted into the union, and declared one of the United States of America. The treaty of amity, settlement and limits, between the United States and Spain, was signed at Washington on the 22d day of February 1819, but was not ratified by Spain till the 24th day of October 1820; nor by the United States, until the 22d day of February 1821. So that Alabama was

admitted into the union as an independent state, in virtue of the title acquired by the United States to her territory under the treaty of April 1803.

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. Had this suit been instituted immediately after the passage of the act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St Ildefonso have been maintained? Could the plaintiff have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail, because the acts of congress on the subject were founded on a misconstruction of the treaty? If it be said, that this statement does not present the question fairly; because a plaintiff admits the authority of the Court, let the parties be changed. If the Spanish grantee had obtained possession so as to be the defendant, would a Court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St Ildefonso was right, and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments, and mark the limits of each.

If the rights of the parties are in any degree changed, that change must be produced by the subsequent arrangements made between the two governments.

A "treaty of amity, settlement, and limits, between the United States of America and the king of Spain," was signed at Washington on the 22d day of February 1819. By the 2d article "his catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida."

The 8th article stipulates, that "all the grants of land made before the 24th of January 1818 by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty."

The Court will not attempt to conceal the difficulty which is created by these articles.

It is well known that Spain had uniformly maintained her construction of the treaty of St Ildefonso.—His catholic majesty had perseveringly insisted that no part of West Florida had been ceded by that treaty, and that the whole country which had been known by that name still belonged to him. It is then a fair inference from the language of the treaty, that he did not mean to retrace his steps, and relinquish his pretensions; but to cede on a sufficient consideration all that he had claimed as his; and consequently, by the 8th article, to stipulate for the confirmation of all those grants which he had made while the title remained in him.

But the United States had uniformly denied the title set up by the crown of Spain; had insisted that a part of West Florida had been transferred to France by the treaty of St Ildefonso, and ceded to the United States by the treaty of April 1803; had asserted this construction by taking actual possession of the country; and had extended its legislation over it. The United States therefore cannot be understood to have admitted that this country belonged to his catholic

majesty, or that it passed from him to them by this article. Had his catholic majesty ceded to the United States "all the territories situated to the eastward of the Mississippi known by the name of East and West Florida," omitting the words "which belong to him," the United States in receiving this cession, might have sanctioned the right to make it, and might have been bound to consider the 8th article as co-extensive with the second. The stipulation of the 8th article might have been construed to be an admission that West Florida to its full extent was ceded by this treaty.

But the insertion of these words materially affects the construction of the article. They cannot be rejected as surplusage. They have a plain meaning, and that meaning can be no other than to limit the extent of the cession. We cannot say they were inserted carelessly or unadvisedly, and must understand them according to their obvious import.

It is not improbable that terms were selected which might not compromise the dignity of either government, and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound, under the state of things existing at the signature of the treaty, to consider the territory then composing a part of the state of Louisiana as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged rightfully to his catholic majesty.

The 6th article of the treaty may be considered in connexion with the second. The 6th stipulates "that the inhabitants of the territories which his catholic majesty cedes to the United States by this treaty, shall be incorporated in the union of the United States, as soon as may be consistent with the principles of the federal constitution."

This article, according to its obvious import, extends to the whole territory which was ceded. The stipulation for the incorporation of the inhabitants of the ceded territory into the union, is co-extensive with the cession. But the country in which the land in controversy lies, was already incorporated into the union. It composed a part of the

state of Louisiana, which was already a member of the American confederacy.

A part of West Florida lay east of the Perdido: and to that the right of his catholic majesty was acknowledged. There was then an ample subject on which the words of the cession might operate, without discarding those which limit its general expressions.

Such is the construction which the Court would put on the treaties by which the United States have acquired the country east of New Orleans. But an explanation of the 8th article seems to have been given by the parties which may vary this construction.

It was discovered that three large grants, which had been supposed at the signature of the treaty to have been made subsequent to the 24th of January 1818, bore a date anterior to that period. Considering these grants as fraudulent, the United States insisted on an express declaration annulling them. This demand was resisted by Spain; and the ratification of the treaty was for some time suspended. At length his catholic majesty yielded, and the following clause was introduced into his ratification: "desirous at the same time of avoiding any doubt or ambiguity concerning the meaning of the 8th article of the treaty, in respect to the date which is pointed out in it as the period for the confirmation of the grants of lands in the Floridas made by me, or by the competent authorities in my royal name, which point of date was fixed in the positive understanding of the three grants of land made in favour of the duke of Alagon, the count of Punon Rostro, and Don Pedro de Vargas, being annulled by its tenor; I think it proper to declare, that the said three grants have remained and do remain entirely annulled and invalid; and that neither the three individuals mentioned, nor those who may have title or interest through them, can avail themselves of the said grants at any time or in any manner; under which explicit declaration, the said 8th article is to be understood as ratified." One of these grants, that to Vargas, lies west of the Perdido.

It has been argued, and with great force, that this explanation forms a part of the article. It may be considered

as if introduced into it as a proviso or exception to the stipulation, in favour of grants anterior to the 24th of January 1818. The article may be understood as if it had been written, that "all the grants of land made before the 24th of January 1818, by his catholic majesty or his lawful authorities in the said territories, ceded by his majesty to the United States, (except those made to the duke of Alagon, the count of Punon Rostro and Don Pedro de Vargas,) shall be ratified and confirmed, &c."

Had this been the form of the original article, it would be difficult to resist the construction that the excepted grants were withdrawn from it by the exception, and would otherwise have been within its provisions. Consequently, that all other fair grants within the time specified, were, as obligatory on the United States, as on his catholic majesty.

One other judge and myself are inclined to adopt this opinion. The majority of the Court however think differently. They suppose that these three large grants being made about the same time, under circumstances strongly indicative of unfairness, and two of them lying east of the Perdido, might be objected to on the ground of fraud common to them all: without implying any opinion that one of them, which was for lands lying within the United States, and most probably in part sold by the government, could have been otherwise confirmed. The government might well insist on closing all future controversy relating to these grants, which might so materially interfere with its own rights and policy in its future disposition of the ceded lands; and not allow them to become the subject of judicial investigation; while other grants, though deemed by it to be invalid, might be left to the ordinary course of the law. The form of the ratification ought not, in their opinion, to change the natural construction of the words of the 8th article, or extend them to embrace grants not otherwise intended to be confirmed by it. An extreme solicitude to provide against injury or inconvenience, from the known existence of such large grants, by insisting upon a declaration of their absolute nullity, can in their opinion furnish no satisfactory proof that the government meant to recognise

the small grants as valid, which in every previous act and struggle it had proclaimed to be void, as being for lands within the American territory.

Whatever difference may exist respecting the effect of the ratification, in whatever sense it may be understood, we think the sound construction of the eighth article will not enable this Court to apply its provisions to the present case. The words of the article are, that "all the grants of land made before the 24th of January 1818, by his catholic majesty, &c. shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty." Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

The article under consideration does not declare that all the grants made by his catholic majesty before the 24th of January 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those acts of congress which

were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c. By whom shall they be ratified and confirmed? This seems to be the language of contract; and if it is, the ratification and confirmation which are promised must be the act of the legislature. Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject. Congress appears to have understood this article as it is understood by the Court. Boards of commissioners have been appointed for East and West Florida, to receive claims for lands; and on their reports titles to lands not exceeding acres have been confirmed, and to a very large amount. On the 23d of May 1828, an act was passed supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida; the 6th section of which enacts, that all claims to land within the territory of Florida, embraced by the treaty between Spain and the United States of the 22d of February 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and which have not been reported as antedated or forged, &c., shall be received and adjudicated by the judge of the superior court of the district within which the land lies, upon the petition of the claimant," &c. Provided, that nothing in this section shall be construed to enable the judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the king of Spain, nor any claim not presented to the commissioners or register and receiver. An appeal is allowed from the decision of the judge of the district to this Court. No such act of confirmation has been extended to grants for lands lying west of the Perdido.

The act of 1804, erecting Louisiana into two territories, has been already mentioned. It annuls all grants for lands in the ceded territories, the title whereof was at the date of the treaty of St Ildefonso in the crown of Spain. The grant in controversy is not brought within any of the exceptions from the enacting clause.

The legislature has passed many subsequent acts previous to the treaty of 1819, the object of which was to adjust the titles to lands in the country acquired by the treaty of 1803.

They cautiously confirm to residents all incomplete titles to lands, for which a warrant or order of survey had been obtained previous to the 1st of October 1800.

An act, passed in April 1814, confirms incomplete titles to lands in the state of Louisiana, for which a warrant or order of survey had been granted prior to the 20th of December 1803, where the claimant or the person under whom he claims was a resident of the province of Louisiana on that day, or at the date of the concession, warrant, or order of survey; and where the tract does not exceed 640 acres. This act extends to those cases only which had been reported by the board of commissioners; and annexes to the confirmation several conditions, which it is unnecessary to review, because the plaintiff does not claim to come within the provisions of the act.

On the 3d of March 1819, congress passed an act confirming all complete grants to land from the Spanish government, contained in the reports made by the commissioners appointed by the president for the purpose of adjusting titles which had been deemed valid by the commissioners; and also all the claims reported as aforesaid, founded on any order of survey, requete, permission to settle, or any written evidence of claim derived from the Spanish authorities, which ought in the opinion of the commissioners to be confirmed; and which by the said reports appear to be derived from the Spanish government before the 20th day of December 1803, and the land claimed to have been cultivated or inhabited on or before that day.

Though the order of survey in this case was granted before the 20th of December 1803, the plaintiff does not bring himself within this act.

Subsequent acts have passed in 1820, 1822 and 1826, but they only confirm claims approved by the commissioners, among which the plaintiff does not allege his to have been placed.

Congress has reserved to itself the supervision of the titles

reported by its commissioners, and has confirmed those which the commissioners have approved, but has passed no law, withdrawing grants generally for lands west of the Perdido from the operation of the 14th section of the act of 1804, or repealing that section.

We are of opinion then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel; on consideration whereof, this Court is of opinion that the said district court committed no error in dismissing the petition of the plaintiffs; therefore it is considered, ordered and adjudged by this Court, that the judgment of the said district court in this cause be, and the same is hereby affirmed with costs.